



Electronic Frontier Foundation
Protecting Rights and Promoting Freedom on the Electronic Frontier

MEMO ENDORSED

February 15, 2006

Honorable Kenneth M. Karas
United States District Judge
United States District Court
Southern District of New York
500 Pearl Street, Room 920
New York, New York 10007

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DOC. #:
DATE FILED: 2/26/06

**RE: *Amicus curiae* brief of Electronic Frontier Foundation in
Elektra v. Barker, No. 05 CV 7340 (KMK)**

Judge Karas:

The Electronic Frontier Foundation (EFF) seeks the Court's approval to file an *amicus curiae* brief in *Elektra v. Barker*, No. 05 CV 7340 (KMK), in support of Defendant's Motion to Dismiss the Complaint. Although EFF had intended to file a motion for leave to file, accompanied by the completed brief, on February 14, 2006, I have been informed that the Court prefers a preliminary letter describing potential *amici* and the issues addressed by the proposed brief prior to the filing of any motion for leave to file. This letter responds to the Court's request.

EFF is a member-supported, nonprofit public interest organization devoted to maintaining the traditional balance that copyright law strikes between the interests of copyright owners and the interests of the public. Founded in 1990, EFF represents more than 10,000 contributing members including consumers, hobbyists, computer programmers, entrepreneurs, students, teachers, and researchers united in their reliance on a balanced copyright system that ensures adequate protection for copyright owners while ensuring access to information in the digital age.

EFF has considerable experience with the copyright issues raised by the new peer-to-peer (P2P) file sharing technologies at the heart of this case. EFF served as counsel for Respondent in *MGM v. Grokster*, 125 S.Ct. 2764 (2005), the only case involving P2P file sharing to have reached the U.S. Supreme Court. As described in more detail in our motion for leave to file, EFF has also appeared as *amicus curiae* in a number of cases involving individuals accused of infringing copyright using P2P file sharing software, including before Judge Chin of this Court.

The *amicus curiae* brief addresses a single question raised by Defendant's motion to dismiss: whether the "distribution right" granted to copyright owners by 17 U.S.C. § 106(3) encompasses transmissions over computer networks. Plaintiffs in their opposition

Honorable Kenneth M. Karas
February 15, 2006
Page 2

brief argue that their § 106(3) rights encompass such transmissions. However, the plain language of the Copyright Act—as well as legislative history, historical practice, and binding Second Circuit precedent—requires that a physical, tangible, material object change hands before the distribution right can be infringed. Accordingly, the § 106(3) right simply has no application in P2P file-sharing cases, as no physical object changes hands when individuals upload or download music over the Internet. The proposed *amicus curiae* brief brings additional Second Circuit precedent and scholarly authorities to the Court's attention in connection with this issue. The brief is 14 pages in length and is ready to be filed immediately.

The EFF brief is intended to assist the Court by providing a more extensive treatment of this important question of law. Moreover, EFF believes that it is better positioned than Defendant to discuss the far-reaching impact that a decision on this issue may have on other copyright contexts far removed from this particular case.

The party's briefing on Defendant's motion was completed on February 6, 2006. It is our understanding that no hearing date has been set for the motion. Counsel for the parties have been informed of the filing of the amicus brief. Counsel for Defendant has consented to the filing of the amicus brief. Counsel for Plaintiffs has declined to take a position on EFF's request for leave to file the brief.

Respectfully,

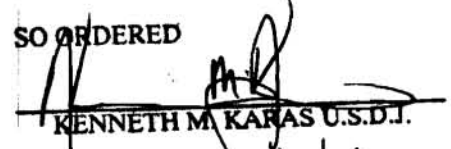


Fred von Lohmann
Senior Intellectual Property Attorney

cc: Ray Beckerman
J. Christopher Jensen
Maryann Penney

EFF may file an amicus brief no longer than
20 pages by no later than February 24, 2006.
The parties may respond in a brief no longer than 10
pages by March 3, 2006.

SO ORDERED


KENNETH M. KARAS U.S.D.J.

2/17/06